

NGEE TAI SHIPPING SDN BHD

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v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT SABAH & SARAWAK, KUCHING

B

HAMID SULTAN ABU BACKER JC

[JUDICIAL REVIEW NO: JR-08-2006-II]

31 OCTOBER 2007

[2007] CLJ (JT3)

C

CIVIL PROCEDURE: *Action - Commencement - Income tax - Issuance of requisition by Inland Revenue Department - Dispute on decision thereof - Whether to be heard via judicial review - Whether to proceed by way of tax appeal before Special Commissioners - Income Tax Act 1967, ss. 54A, 99, 106(1), 108(5)*

D

REVENUE LAW: *Income Tax - Requisition - Alleged non-deduction of tax from dividend - Whether in the nature of assessment or statutory debt - Whether constituting "tax" - Dispute thereof - Whether to be referred to Special Commissioners - Requisition challenged by way of judicial review - Whether procedurally improper - Income Tax Act 1967, ss. 54A, 99, 106(1), 108(5)*

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The applicant company in this case was issued with a requisition in Form S by the respondent pursuant to s. 108(5) of the Income Tax Act 1967 ('ITA'). The applicant sought to challenge the respondent's decision and, upon the latter's advice and the authority of *Ketua Pengarah Hasil Dalam Negeri v. Rheem (Far East) Pte Ltd* and *Malayan United Industries Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor*, applied for an order of *certiorari* to quash the decision. It was not in dispute that the two decisions of the High Court in essence ruled that a requisition, not being an assessment, is not amenable to tax appeal before the Special Commissioners, and that the proper way to go about it is to apply for judicial review. Those decisions notwithstanding, the learned Judicial Commissioner, on the facts before him, decided, nonetheless, to re-scrutinize the relevant statutory provisions, and consequently resolve for himself the question of whether the applicant ought rightly to proceed by way of *certiorari*, or by way of a tax appeal to the Special Commissioners.

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A Held (ordering hearing before the Special Commissioners):

- B** (1) Any matter relating to tax dispute must be referred to the Special Commissioners of Income Tax pursuant to s. 99 of the ITA. A requisition is no exception as the statutory debt referred to in *Rheem's* case and *Malayan United* is inextricably woven with tax liability and assessment. A statutory debt has no separate existence, and there cannot be a debt arising under the ITA other than the one in consequence of tax liability relating to an assessment. (para 11)
- C** (2) Pursuant to s. 98 of the ITA, it is clear that Parliament has deemed it fit that any dispute involving a taxpayer and the government must be referred to the Special Commissioners. And, though it is admitted that s. 99 of the ITA gives jurisdiction and powers for the Special Commissioners to deal with assessment, it necessarily relates to tax liability which ultimately under the ITA may be crystallized to a debt and/or statutory debt. (para 11)
- D**
- E** (3) One cannot argue, in reliance on *Rheem's* case, that since s. 106 of the ITA (tax due and payable may be recovered by civil proceedings as a debt due to the Government) crystallizes a sum due and owing as a debt, all disputes in relation to s. 106 must be referred to the court by way of judicial review and not to the Special Commissioners. Such an interpretation, for one, will make the Special Commissioners totally redundant. Further, to say that an assessment pursuant to s. 106 has become a statutory debt and therefore any claim thereon must be made within the six years limitation period, would create much loss of revenue to the Government. (para 11)
- F**
- G**
- H** (4) A requisition issued under s. 108(5) of the ITA only creates a statutory presumption that a statutory debt is created within the mechanism of s. 108. However, if one objects to the mechanism as in this case, then it is clear that there is a tax dispute, relating to assessment of tax. Support for the proposition is reflected in the provisions of s. 108 and other sections such as s. 110, as well as the submission of the parties, which revolves on the question whether there was or was no tax liability. Thus, the debt due and owing is inextricably interwoven with tax liability and/or assessment, as the whole issue is anchored on whether there was profit or no profit subject to tax. (para 13)
- I**

- (5) The applicant had initially requested the matter to be referred to the Special Commissioners, but succumbed to the respondent's view for the matter be referred to court by way of judicial review. In the circumstances, it would be appropriate for the court not to issue the prerogative order of *certiorari*, but exercise instead the prerogative rights relating to directions and orders and direct the tax dispute to be referred to the Special Commissioners to be dealt with under s. 99 of the ITA. (para 14)

Case(s) referred to:

- Chandra Mohan v. State of UP* AIR [1966] SC 1987 (*refd*)
- Chong Chung Moi v. The Government of the State of Sabah & 2 Ors* [2007] 4 AMR 472 (*refd*)
- Citibank Berhad v. Mohamed Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739 CA (*refd*)
- Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 FC (*refd*)
- Foo Loke Yong & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (*refd*)
- Hiew Kon Fah & Anor v. Kwan Ngen Wah & Ors* [2007] 5 CLJ 538 HC (*refd*)
- Ketua Pengarah Hasil Dalam Negeri v. Rheem (Far East) Pte Ltd* [1998] 2 CLJ Supp 351 HC (*not foll*)
- Malayan United Industries Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2006] 5 CLJ 240 HC (*not foll*)
- National Land Finance Co-operative Society Ltd v. DGIR* [1993] 4 CLJ 339 SC (*refd*)
- Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491 CA (*refd*)
- State of Punjab v. Ajaib Singh* AIR [1953] SC 10 (*refd*)
- TSB v. KPHDN* [1996] 2 BLJ 403 (*refd*)
- Union of India v. Deoki Nandan Aggarwal* AIR [1992] SC 96 (*refd*)

Legislation referred to:

- Evidence Act 1950, s. 31A
- Income Tax Act 1967, ss. 54, 98, 99, 106(1), 108(1), (5)
- Interpretation Acts 1948 and 1967, ss. 17A, 108

Other source(s) referred to:

- Bindra's Interpretation of Statutes*, 7th edn, pp 947, 948
- "Is s. 31A of the Evidence Act 1950 True or is it a Tribute to Sir James Fitzjames Stephen?" [1995] 1 MLJ xcvi
- For the applicant - Albert Tang Yew Liong; M/s Chew, Jugah Wan Ullok & Co
- For the respondent - Hazlina Hussain Mohd Zaidi SFC
- Reported by WA Sharif

A

JUDGMENT

Hamid Sultan Abu Backer JC:

B [1] This is my judgment in respect of the judicial review application made by the applicant to seek an order of *certiorari* to quash the decision of the respondent to issue and/or maintain a requisition under s. 108 of the Income Tax 1967 (ITA 1967).

C [2] At the outset of the proceedings, I have informed both parties that:

- D (i) Any dispute arising as a result of tax disputes as to liability or quantum must first be dealt with Special Commissioners pursuant to s. 99 of ITA 1967.
- E (ii) It is premature to seek any prerogative orders without exhausting all remedies.
- F (iii) The court is minded to direct the matter to be referred to Special Commissioners if both parties consent, as Special Commissioners are persons who have been selected to specially deal with tax disputes. Besides, their opinions will be a great advantage for the court to adjudicate on the grievance of the parties. It is not to the advantage of the court by its decision to undermine the role of Special Commissioners who in almost all cases are selected because of their expertise in law as well as tax matters.

G [3] Both parties have informed me that there are at least two decisions of the High Court in which the learned judges have held that any dispute under s. 108 ITA 1967 in respect of requisition must be by way of judicial review and cannot be referred to Special Commissioners, the reason being: (i) a requisition is not an assessment. Since it is not an assessment the Special Commissioners under s. 99 have no jurisdiction and powers to hear the same. (ii) a requisition is not an assessment but a debt due and owing within the mechanism of s. 108 of ITA 1967.

H [4] The two cases which they rely on are namely: (i) *Ketua Pengarah Hasil Dalam Negeri v. Rheem (Far East) Pte Ltd* [1998] 2 CLJ Supp 351. (*Rheem's* case) and (ii) *Malayan United Industries Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2006] 5 CLJ 240 (*Malayan Untied*). I will deal with these cases later in the judgment.

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Brief Facts

[5] The applicant *inter alia* says as follows:

(a) the applicant is a shipping company and under s. 54A ITA 1967, shipping income on Malaysian ships is exempted from tax. (b) as at 30 September 2000, the retained profit of the applicant was RM5,735,032 (made up of shipping profit of RM2,945,104 and non-taxable profit of RM2,789,928), while the exempt income account was RM2,581,311. (c) on 31 January 2000, the applicant's directors resolved to pay an interim dividend. (d) following the declaration of "interim dividend", the respondent invoked s. 108 and issued its requisition under s. 108(5) (Form S) on 19 June 2001 in relation to the "interim dividend". (e) on 31 August 2001, the applicant held an AGM and revoked the "interim dividend" declared by the directors and the respondent was duly informed on 8 May 2002. (f) subsequently, the account for the applicant for the year ending 30 September 2001 was adjusted to reflect cancellation of "interim dividend". Following that, the shareholders of the applicant notified the respondent of the cancellation of the "interim dividend". (g) there was then a series of correspondences between the applicant's tax advisors, Messrs Liew & Co. and the respondent, *inter alia*, seeking the respondent to withdraw the Form S, etc. On 27 May 2004, the respondent requested the applicant to file Form Q (Tax Appeal to the Special Tax Commissioners). (h) on 17 May 2006, the respondent informed the applicant's tax advisor that its technical department had advised that s. 108 (Form S) is not amenable to Tax Appeal and the proper way to go about is to apply for Judicial Review. And hence, this application for Judicial Review before this court.

[6] The applicant further asserts that: (i) the respondent erred in law and/or exceeded its jurisdiction when it misdirected itself in law and/or misconstrued the applicable or relevant legal principles in arriving at the decision to issue and/or maintain the requisition under s. 108 of the ITA 1967 on 19 June 2001 (Form S) in respect of year of assessment 2000 STTS as there was no payment of interim dividend in reality to any of the shareholders for reasons stated above. (ii) the said decision of the respondent was irrational and wholly unreasonable and/or without proper basis. The applicant summarises the argument by saying that the

A only issue to be determined by the court is whether: (1) a company could revoke a declaration of interim dividend by a duly convened AGM? (2) if so, whether the respondent could still maintain the requisition under s. 108(5) ITA 1967?

B [7] The respondent contends that (i) section 108 of the ITA 1967 is applicable because dividends were in fact declared and paid but the applicant had failed to deduct tax on the dividends which were paid to the shareholder. (ii) the applicant's compared total exceeded the compared aggregate. Thus, the requisition
C issued by the respondent by virtue of s. 108(5) of the ITA 1967 was justified.

[8] The respondent, *inter alia*, submits as follows:

(a) the action taken by the respondent in issuing the Form S
D under s. 108(5) of the ITA was correct in law (b) in order to support the respondent's argument, the respondent says: (i) there was a profit – it is not in dispute that the company made a profit. Thus, the profit was distributed to the shareholders through the payment of dividend (ii) tax was not paid – dividend was indeed
E declared and paid. However, according to the dividend certificates, they clearly show that the applicant did not deduct the tax when the dividends were paid. Thus, the applicant has failed to comply with s. 108(1) of the ITA 1967. Section 108(1) of the ITA 1967 provides as follows:

F Deduction of tax from dividends

(1) Where a dividend is paid or credited by a company to any of its shareholders, then, if the dividend is deemed by virtue of section 14 to be derived from Malaysia, the company shall be
G entitled to deduct tax therefrom at the rate applicable to the company for the year of assessment in which the dividend is paid or credited or, where there is no chargeable income of the company for that year at the rate which would be so applicable if there were such chargeable income.

H (iii) compared total exceeded compared aggregate – There was a shortfall in the exempt account when the dividends were declared. (iv) section 108(5) of the ITA 1967 when the compared total exceeded the compared aggregate, the excess shall be a debt due and the Director General is empowered to issue requisition/Form
I S under s. 108(5) of the ITA 1967. Requisition under s. 108(5) of the ITA 1967 was issued to recover the amount of tax which

should have been raised on the dividend amounting to RM551,712.39. (v) AGM was passed after requisition was issued and AGM cannot revoke the dividend. The respondent says that the articles and association of the applicant does not authorise the applicant to revoke the dividend which has been declared and paid. Further, the respondent asserts that based on the event which has taken place, the action taken by the applicant was clearly an afterthought. Accordingly, the respondent urges the court to dismiss this application with costs on the following grounds: (i) there was profit; (ii) dividends were paid; (iii) non compliance of s. 108(1) of the ITA 1967 when no tax was paid on the dividend; (iv) compared total exceeded compared aggregate; (v) the respondent was empowered under s. 108(5) of the ITA 1967 to issue the requisition; (vi) AGM cannot revoke the dividend; (vii) no rectification in the account; (viii) no resolution passed with regard to the alleged loan to the director.

The Law

[9] In *Rheem's* case (*supra*) the scope of requisition under s. 108 of ITA 1967 was discussed. The court, in total reliance of counsel's argument, observed as follows:

As regards the application of s. 108 of the said Act on the issue of requisition the counsel for the applicant explained as follows. In Malaysia the company taxation is based on the imputation system which means that the full amount of income tax paid by a company is imputed to the shareholders. Under s. 108 every company resident in Malaysia or a company resident in Singapore and which has declared itself to be a resident in Malaysia for the purpose of Article VII on dividends of the double taxation agreement Malaysia - Singapore of which the respondent was such a company, is required to deduct income tax at the rate of 35% (applicable rate at the material time) from any dividend paid to the shareholders. However, the company is entitled to frank the income tax to be deducted out of the income tax which it has previously suffered on its taxable profits. For this purpose the company is required to maintain an account known as the "s. 108 account" in order to keep track of the amount of tax franking credit available. Entries to s. 108 account are in the form of credits and debits. The credit total represent tax paid or payable by the company for the current or previous years of assessment. This is called the compared aggregate. The debit total represent the amounts of tax deducted or deemed deducted from dividends paid for the current years of assessment. This is called the compared total.

- A At the end of the assessment year, the Director General of Inland Revenue (DGIR) will compare the compared total with the compared aggregate. When the compared total exceeds the compared aggregate the amount of the excess is a debt due to the government from the company. In such a situation, the DGIR
- B will issue a written requisition under s. 108(5) of the said Act calling upon the company to pay the amount of the debt. The rationale behind this is that, if not for this charge the government would be paying out (in the form of tax credit to a shareholder of the company) more money than the Government has received from the company on its profits since tax deducted or deemed
- C deducted is imputed to the shareholders as income tax paid in advance.

- Thus on the basis of the above explanation, it is very clear that the amount demanded in a requisition is not a tax. Section 108(5) of the said Act states that the amount is a “debt” due and payable. On the service of the requisition, it is not described as a tax because it is not a tax as such. The word “debt” is also used
- D in s. 108(7) and (8) of the said Act. Under s. 108(8) the DGIR is authorised to make any necessary revisions in the requisition because of revisions in the compared total and compared aggregate due to any assessment, composite assessment or any repayment
- E of tax.

- It is important to note here that the above paragraph quoted by the counsel also appears in one of the decisions of Special Commissioners dealing with a tax dispute under s. 99, relating to
- F a s. 108 dispute (see *TSB v. KPHDN* [1996] 2 BLJ 403). In the case of *TSB (supra)*, the issue of jurisdiction was not taken by the respondent. However, in *Rheem’s case (supra)*, the respondent was saying that the Special Commissioners did not have jurisdiction to hear a matter arising out of requisition under s. 108. The
- G respondent in *Malayan United (supra)* opted for a different stand and took the position that a requisition under s. 108 must be referred to the Special Commissioners. However, the court there followed the decision of *Rheem’s case (supra)* and the respondent’s argument was not entertained and I am informed that the
- H respondent has appealed on the said decision. In my view, it will appear that there is much confusion in this area of the law. This statement has been directly and/or indirectly expressed in many judgments, for example, in *National Land Finance Co-operative Society Ltd v. DGIR* [1993] 4 CLJ 339 where Gun Chit Tuan CJ
- I (Malaya) said at p. 344 as follows:

We realize that revenue from taxation is essential to enable Government to administer the country and that the Courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. I.R.C.*: ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

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[10] In *Malayan United (supra)*, the Court in reliance of *Rheem's* case (*supra*) held that:

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[1] Sums claimed under s. 108(1) of the ITA requisition are a form of statutory debt. Such sums clearly do not constitute "tax". Further, it is clear that s. 108(5) debts do not constitute duty within the meaning of the proviso to s. 33(1) of the ITA as duty, in this sense, refers to federal taxes. (para 14)

D

[2] Judicial review is the most appropriate, convenient and suitable procedure to challenge a decision under s. 108 of the ITA. (para 12)

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[3] The second respondent's case against the applicant commenced upon the submission of all relevant forms by the applicant. Since a s. 108 requisition under the ITA was not "tax" within the meaning of s. 33 of the ITA, the Form S issued by the DGIR some eight to eleven years later was time-barred pursuant s. 6(1)(d) of the LA. (paras 16 & 17).

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[11] I have read the application, affidavits and submissions of the parties in detail. I take the view that any matters relating to tax dispute must be referred to Special Commissioners, pursuant to s. 99 of ITA 1967. Section 108 requisition, is no exception as the statutory debt referred to in *Rheem's* case (*supra*) and *Malayan United (supra)* is inextricably interwoven with tax liability and assessment. The statutory debt has no separate existence. There cannot be a debt arising under the Tax Act other than the one in consequence of tax liability relating to an assessment. Any narrow interpretation of critical provision of the ITA 1967 may create much confusion and imbalance to the tax law. My reasons are as follows:

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- A (i) Special Commissioners are appointed under s. 98 of ITA 1967. That section reads as follows:
- B (1) For the purposes of this Act there shall be three or more Special Commissioners of Income Tax and a Clerk to the Special Commissioners.
- C (2) The Special Commissioners shall be appointed by the Yang di-Pertuan Agong.
- D (3) The Special Commissioners shall include such number of persons with judicial or other legal experience (that is to say, experience as an advocate, as a member of the judicial and legal service or as the holder of an office to which the Judges Remuneration Act 1971 [Act 45], applies) as may be necessary for the purposes of paragraph 1 of Schedule 5; and, if the Yang di-Pertuan Agong considers it expedient to do so, he may appoint one of those persons to be the Chairman of the Special Commissioners.
- E (4) Each Special Commissioner:
- (a) shall hold office for such period and on such terms (including terms as to remuneration and allowances) as may be specified by the Minister; and
- (b) shall be deemed to be a public servant within the meaning of section 21 of the Penal Code [Act 574].
- F (5) The office of the Clerk shall be a federal public office.
- G (ii) Under the above section it is clear that Parliament has deemed it fit that any dispute relating to taxpayer and the government must be referred to Special Commissioners who are expected to be selected for their specialty in tax law and this is reflected by their remuneration which has to follow the scale under the Judges Remuneration Act 1967.
- H (iii) Though it is admitted that s. 99 of ITA 1967 gives jurisdiction and powers for the Special Commissioners to deal with assessment it necessarily relates to tax liability which ultimately under the ITA 1967 may be crystalised to debt and/or statutory debt. For example, s. 106(1) of ITA 1967 says:
- I (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

If one were to argue in reliance *Rheem's* case (*supra*) that since s. 106 crystallises a sum due and owing as a debt, all disputes in relation to section 106 must be referred to the court by way of judicial review and not to the Special Commissioners then such interpretation will totally make the Special Commissioners redundant. Further, to say s. 106 relating to an assessment has become a statutory debt and in consequence any claim relating to assessment must be made within six years limitation period or it will be statute-barred, will create much loss of revenue for the government and public will be affected.

- (iv) Such anomalies in interpretation of statute must be avoided. We have to a large extent departed from the common law position of interpretation of statute after the introduction of the purposive rule under s. 17A of the Interpretation Act 1967. It will be no more appropriate to just interpret a particular section in isolation to the parent Act, as it may amount to tinkering with the Act. I have dealt with such issues in relation to s. 31A of the Evidence Act in an article captioned "*Is s. 31A of the Evidence Act 1950 True or is it a Tribute to Sir James Fitzjames Stephen?*" [1995] 1 MLJ xcvi. Subsequent to the said article, s. 31A was repealed. I will not repeat what I have said there but will summarise that general principles relating to interpretation of the statute and Constitution are as follows:

Principles Of Interpretation

The rules of interpretation of statutes, constitution and procedural laws are well established in a number of cases. (See *Citibank Berhad v. Mohamed Khalid bin Farzalur Rahaman & 2 Ors.* [2000] 3 CLJ 739; *Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd.* [2004] 1 CLJ 701 (FC); *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd.* [1995] 1 CLJ 491 (CA) respectively for the principles relating to interpretation of statutes Constitution and Procedural laws.) Gopal Sri Ram JCA sitting in the coram of the Federal Court had stated that the courts have devised for themselves certain guidelines and presumptions for the interpretation of statutes. His Lordship asserted that though they are called rules of construction they are not rules at all but merely guidelines. Further, His Lordship stated that the courts have formulated four different

- A rules for the interpretation of statutes, which have been termed as the literal rule, the golden rule, the mischief rule and the purposive rule. Further, His Lordship added that more recently Professor Rupert Cross formulated what he termed as
- B “the unified contextual approach”. This, His Lordship opines, in essence combines all these so called rules in a step-by-step process for the discovery of the meaning of the statutory language. (See *Citibank Berhad (supra)* and see s. 17A Interpretation Acts 1948 and 1967 (Act 388)).
- C In analysing these rules the learned judge says that the suggested methods offer a different approach to the construction of statutes. For example, His Lordship says that the literal rule pays attention to nothing more and nothing less than the actual words used by the statute; the golden rule
- D permits the judicial interpreter in a very limited circumstance to supply an omission in a statutory provision where the literal approach leads to absurdity or injustice; the mischief rule looks to the state of the law at the time an Act was passed to see the mischief or defect that Parliament seeks to remedy and the
- E purposive approach, which is the refinement of the mischief rule, requires a court to look at the purpose of the Act.
- F In conclusion, His Lordship opines that despite the several available approaches, it is noteworthy that it is the purposive approach that has emerged to hold the field. His Lordship, asserts that this is reflected in s. 17A of the Interpretation Acts 1948 and 1968 which states that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be
- G preferred to a construction that would not promote that purpose or object.

Interpretation Of Constitution

- H The principles relating to the construction of the Constitutional provisions are well established in a number of cases. (See *Danaharta Urus Sdn. Bhd (supra)*). In brief, it may be said that if the language of the article in the Constitution is plain and unambiguous and admits to only one meaning,
- I then the duty of the court is to adopt that meaning, irrespective of the inconvenience that such a construction may produce. If two constructions are possible, then the court must adopt that which will ensure smooth and harmonious

working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory. (See *State of Punjab v. Ajaib Singh* AIR [1953] SC 10 (para 15)).

The fundamental rule of construction is the same whether one construes the provisions of the Constitution or an Act of Parliament and the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. (See *Chandra Mohan v. State of U.P* AIR [1966] SC 1987 (para 14)). In *Union of India v. Deoki Nandan Aggarwal* AIR [1992] SC 96 the Supreme Court of India asserted that courts should decide what the law is and not what it should be. The court must adopt a constitutional interpretation, which will carry out the obvious intention of the legislature but could not legislate itself. (See *Union of India (supra)*). In *Danaharta Urus Sdn. Bhd. (supra)* the Federal Court adopted the canons of Constitutional interpretation put forward by the learned authors of *Bindra's Interpretation of Statutes*, (*Bindra's Interpretation of Statutes*, 7th edn at 947 and 948) where in brief the learned authors say that the Constitution must be considered as a whole, and so give effect, as far as possible, to all its provisions. Further, the authors have asserted that it is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. The learned authors say that an elementary rule of construction is that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. (See *Danaharta Urus (supra)*).

[12] After the introduction of s. 17A of the Interpretation Act, it is my view that all statutes or rules of procedure must be interpreted in the manner the Constitution is interpreted. One must not interpret a particular section without taking into consideration the consequence of such interpretation on the other section of the parent Act. Case law such as *Foo Loke Yong & Anor*

- A *v. Television Broadcasts Ltd. & Ors* [1985] 2 MLJ 35 may have limited application only in view of s. 17A of the Interpretation Acts. In that case, Abdoolcader SCJ opined:

B The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does not act in vain, the court must endeavor to give significance to every word of enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

- C [13] It is my judgment that a requisition issued under s. 108 of ITA 1967 (all things being equal) only creates a statutory presumption that a statutory debt is created within the mechanism of s. 108. However, if one objects to the mechanism the statutory debt has arisen as in this case, then it is clear that there is a tax dispute, relating to assessment of tax. Support for the proposition is reflected in various provisions of the said section itself and other sections such as s. 110. This is fortified by the submission of the parties wherein they have related their arguments to profit, dividend, assessment, etc. In crux, the applicant is saying on the facts that there is no tax liability. However, the respondent contends there is tax liability. Thus, the debt due and owing is inextricably interwoven with tax liability and/or assessment as the whole issue is anchored on whether there was profit or no profit subject to tax. It is my judgment that a judge of the High Court ought to uphold the intent of Parliament where to do so would be to lead to justice and the convenience of the citizen. There are practical consequences to this approach which cannot be gainsaid; the first being that courts would be less inundated with unnecessary suits; secondly, an aggrieved taxpayer is able to rely on a simple, single procedure before a group of specially selected persons who deal with this kind of complaints every day, that being their specialty. If a taxpayer is unhappy with the decision of the Special Commissioners, such a person may appear before the High Court armed with his complaint, and seek such remedy as may be provided under the law. In consequence there is no good reason why the operation of an Act of Parliament ought to be stultified by too early an intervention by the High Court.

- I [14] On the facts of the case, evidence was adduced that the applicant initially requested the matter to be referred to the Special Commissioners but the respondent was of the view in reliance of *Rheem's* case (*supra*) that the matter must be referred to court by

way of judicial review. In the circumstances, it will be appropriate for me not to issue the prerogative order of *certiorari* but exercise the prerogative rights, relating to directions and/or orders and direct the tax dispute to be referred to the Special Commissioners. I have dealt with the principles relating to prerogative writs, orders and direction in the case of *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & 2 Ors* [2007] 4 AMR 472 and the relevant part reads as follows:

18. The remedy and relief for judicial review is in the nature of order for mandamus prohibition, *certiorari* and writ of *habeas corpus*, etc. which originates from the law of prerogative writs embedded in the history of common law and judicial institutions in England. Prerogative writs were issued by the courts, only upon proper cause shown and never as a matter of right. Generally, it was issued where there is a direct interference by the government with the liberty and property of the subject and is issued pursuant to the prerogative powers of the crown.

19. In Malaysia, the relief, formerly available only by such writs, is now obtainable, pursuant to CJA 1967 and the procedure to acquire the same is set out in Order 53 RHC 1980. The new amendment to the said order sets out the full procedure for judicial review. It makes major changes in the present procedure and relief. A senior member of the Malaysian Bar, *N. Sivabalan (supra)* has in my view adequately dealt with the scope of the said amendment and I do not propose to repeat the same save to say that the High Court has additional powers in particular to issue prerogative writs to any person or authority, direction, order or writs, including writs of the nature of *habeas corpus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Federal Constitution, or any of them or for any purpose. Even if such powers are not there or are restrictively worded as is reflected in CJA 1967, the courts are necessarily vested with such powers within the doctrine of separation of powers to protect the constitution with always the right to issue the prerogative writs or orders as the case may be

[15] Again, in *Hiew Kon Fah & Anor v. Kwan Ngen Wah & Ors* [2007] 5 CLJ 538, I have dealt with the scope of prerogative orders and directions and the relevant part is reproduced below:

- A (a) The courts' role under the Federal Constitution and within the realm of separation of powers is not only to sit as an umpire and adjudicate what is wrong and what is right. It has a further duty to ensure that all aspects relating to administration of justice runs prim and proper. For this purpose, courts can question any acts, omissions or negligence of any person or authority. This is normally done by way of prerogative writs, orders and/or directions which has been to a large extent encapsulated in paragraph (1) of the Additional Powers of the High Court, pursuant to section 25(2) of the Courts of Judicature Act 1964 (CJA 1964). I have dealt with this area of the law in my judgment delivered on 5-06-2007 in the case of Kota Kinabalu High Court JR K25-19 of 2006 *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & 2 Ors.* These orders and directions and the related jurisprudence have become quite forgotten by our advocates and in consequence elements of justice at various stages often have been compromised before reaching the court. These orders and directions are essential to enhance the importance, integrity and magnanimity of judicial process for which the courts are bulwark under the Federal Constitution. Courts in England, pursuant to such powers, have formulated on and of various orders and directions to stand as a guideline for person or authority to operate efficiently. The root principle of the English law as to jurisdiction is that the judges stand in the place of the Sovereign, in whose name they administer justice. (See *John Russell & Co Ltd v. Cayzer, Irvine & Co Ltd* [1916] 2 AC 298 at 302, HL). The Indian Courts have exercised such jurisdiction and powers in various cases, for example, in *Dilip K. Basu v. State of West Bengal* AIR [1997] SC 3017, where it was stated that:
- G There is no wrong without a remedy. The law wills that in every case where a man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.
- H
- I In this case, the Supreme Court of India treated a letter of complaint as a writ petition (meaning an application seeking prerogative orders as stated in CJA 1964) and *suo motu* issued notices to all State Government and made various orders.

...

The nature of such relief will depend on the problem that requires an answer and may take many forms. Judicial precedents in the Commonwealth jurisdiction has demonstrated to us that a judge can grant any form of orders to arrest a wrong and in that process can formulate and advance the remedy within its jurisdiction and powers, directions and/or remedies. All these orders are designed to protect the constitutional rights of the public and/or ensure due performance of the related organs of government, in the interest of the public. The public, have a right to expect a court to protect their rights. It is trite that the court is constitutionally duty bound to give orders and/or directions to relevant authorities when there is any failure of person or authorities to perform an act which they are duty bound to discharge, is brought to its notice, more so when it relates to the administration of justice. Further, to do so, in cases where it is necessary and essential, the court is duty bound to formulate and advance the remedy.

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- (c) Police protection orders are very commonly applied in syariah courts and the syariah courts make such orders pursuant to its inherent jurisdiction and it is often granted by way of *ex parte* application. The High Court has jurisdiction and powers to grant such orders within the doctrine of Separation of Powers and within the scope of the Additional Powers of the High Court. Failure to comply with the orders and/or directions of the court by any person or authority will attract penal sanction, pursuant to Article 126 of the Federal Constitution which reads as follows:

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The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

[16] In consequence of prerogative jurisdiction and powers, I make the following orders in respect of this application:

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- (i) the matter be referred to by the respondent to the Special Commissioners and be dealt with under s. 99 of ITA 1967.
- (ii) no order as to costs.

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